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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

No. 412

TURNER DAIRY COMPANY,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your Petitioner, Turner Dairy Company, prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh District which was entered in this case between the above named parties on June 20, 1947, rehearing denied August 7, 1947.

## STATEMENT OF MATTER INVOLVED.

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The judgment of the Circuit Court of Appeals for the Seventh Circuit and its accompanying opinion appear in the case of *United States* v. *Turner Dairy Co.*, 162 F. 2d 425.

The two decrees, that will be under consideration, which were entered in this case were based upon pleadings and motions for summary judgment. The original complaint, filed May 7, 1940, after outlining, in rather brief form, a history of Order No. 41 and certain provisions thereof, charged:

1. In Paragraph VII that the defendant, in violation of the Act and the Order, has failed and refused to make reports to the Market Administrator in accordance with the provisions of the Order and that such reports as the defendant has submitted are obviously incomplete (Rec. 4).
2. That the defendant has failed and refused to make available to the Market Administrator its records for the purpose of verifying information contained in reports submitted to the Market Administrator (Par. VIII of Complaint, Rec. 4, 5).
3. That the defendant has reported large quantities of Class III milk, alleged to have been used to manufacture butter, but that it has submitted no records to prove that it actually made butter from said milk and that the Market Administrator has therefore classified said milk as Class I in pursuance of the Order (Par. IX of Complaint, Rec. 5).
4. That the order requires each handler on the 14th day after each month of delivery, to pay to the Market Administrator for deposit in the Producer-Settlement Fund, certain monies according to a formula of the Order and that the defendant, in violation thereof, has failed and refused to make the payments; and that at the time of the filing of the complaint, the defendant was in default with respect to said payments for all delivery periods, since the effective date of the Order, September 1, 1939 (Par. IX of Complaint, Rec. 5, 6).

The complaint did not seek a money judgment of any kind, but only prayed for the following relief:

"(1) That the Court issue a preliminary man-

datory injunction commanding the defendant, Turner Dairy Company, its agents, officers, employees, attorneys, successors and assigns and all persons acting in concert with them to comply fully pending the final determination of this case with all the provisions of Order No. 41 order regulating the handling of milk in the Chicago Illinois marketing area.

"(2) That the Court issue a permanent injunction enjoining and restraining the defendant Turner Dairy Company, its agents, officers, employees, attorneys, successors, and assigns, and all persons acting in concert with them, from violating any of the provisions of said Order No. 41.

"(3) That the plaintiff be given all such other, further and different relief as this Court may deem just" (Rec. 6).

Attached to the complaint is the original Order No. 41, regulating the handling of milk in the Chicago marketing area, issued August 28, 1939 and effective September 1, 1939 (Rec. 7-21).

Defendant filed a long answer setting up the number of factual and legal defenses (Rec. 25-40) and a counter-claim (Rec. 40-42). A motion was made to dismiss the counter-claim (Rec. 42, 43).

While these pleadings were pending, the plaintiff made a motion for summary judgment (Rec. 47-54) and filed a number of affidavits in support thereof (Rec. 54-74). The motion for a summary judgment sought the following relief:

"(1) commanding the defendant, its agents, attorneys, employees, and assigns, to comply fully, with respect to the period from September 1, 1939, to the date of the entry of such judgment, with all the provisions of Order No. 41, Order Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, issued by the Secretary of Agriculture of the

United States pursuant to the Agricultural Marketing Agreement Act of 1937;

"(2) restraining and enjoining the defendant, its agents, attorneys, employees, and assigns, from handling milk in violation of any of the terms of said Order No. 41;

"(3) particularly requiring said defendant, its agents, attorneys, employees, and assigns—

"(a) to make payments to producers through said Market Administrator of all sums due from said defendant to said producers under the provisions of Section 941.8(c) of Order No. 41, said payment to be made within ten days after the date on which judgment is entered herein;

"(b) to make available to the Market Administrator or his agents, in accordance with the provisions of Section 941.5(b) of the order, all records requisite to the verification of information contained in reports submitted by defendant, Turner Dairy Company, in accordance with the provisions of Section 941.3 of said order."

This motion thereupon proceeded to state the reasons for the entry of such separate summary judgment and contained some alleged factual statements and briefs. The affidavits filed in support of the motion for summary judgment, heretofore referred to, tended to support the statements made in the motion for summary judgment.

On November 28, 1940, the plaintiff filed a supplemental complaint (Rec. 90-91), in which it alleged that the original Order No. 41 was amended on June 21, 1940 and was effective July 1, 1940; the amended Order No. 41 was attached to the supplemental complaint as an exhibit (Rec. 93-113). The supplemental complaint in Paragraph XV (Rec. 91) alleged that the defendant has failed and refused to make any payments to the Market Administrator for the expense of administering the Order, as provided

therein; and that the defendant failed to pay to the Market Administrator a 3¢ per hundredweight deduction on all milk received from producers, in violation of a certain provision of the order. The relief prayed for in the supplemental complaint was "that the same relief against defendant demanded in Paragraph X of the complaint herein be granted with reference to Order No. 41 as amended" (Rec. 91).

The defendant filed an answer to the supplemental complaint (Rec. 114, 115).

On February 8, 1941 (Rec. 115), the court filed a Memorandum of Opinion and Order, in which the defendant's counter-claim was stricken (Rec. 116, 117). After the motion for summary judgment, the court ruled in favor of the plaintiff on all points, except one. With respect to this matter, the court ruled:

> "One question of fact remains. It is alleged in the complaint that the defendant has failed to make the reports required by the order and has made false reports. Those allegations with reference to the reports are specifically denied in the answer. The affidavits presented by defendant tend to support its claim that it has made the reports required and that the reports were true. Here we have a controverted question of fact which prevents the entering of summary judgment as requested by the plaintiff. I will set this case to be heard on this one question, Thursday, February 13, 1941." (Rec. 117, 18.)

On June 26, 1941 (Rec. 123) the plaintiff filed a notice of motion which was served on defendant's counsel that on June 26, 1941 it would submit to the court certain findings of fact, conclusions of law and a judgment on plaintiff's motion for summary judgment (Rec. 124). A copy of the proposed findings of fact, conclusions of law and summary judgment was attached thereto (Rec. 125-130).

On May 24, 1942 (Rec. 132), the court entered its findings of fact, conclusions of law and an order on plaintiff's motion (Rec. 133-136). It found that in accordance with its memorandum order heretofore referred to, the cause came on to be heard on February 14, 1941 and that evidence was taken and that from the pleadings, admissions and affidavits on file, there is no genuine issue and particularly, the court found that the defendant has failed and refused to make its books and records available to the Market Administrator, and to give the Market Administrator and his duly authorized agents access to its books and records for the purpose of verifying such reports as the defendant has made: the court further found that the extent to which said reports are incomplete and inaccurate cannot be determined unless and until the Market Administrator is given access to all the defendant's books and records (Rec. 134). The court thereupon entered the following order:

> "Now, Therefore, upon the aforesaid findings of fact and conclusions of law it is Adjudged, Ordered and Decreed as follows:
>
> "1. That mandatory injunction issue commanding the defendant Turner Dairy Company, its agents, attorneys, employees, successors, and assigns, to comply fully with respect to the period from September 1, 1939, to and including June 30, 1941, with all of the provisions of Order No. 41, as originally issued and subsequently amended, effective July 1, 1940, order regulating the handling of milk in the Chicago, Illinois, marketing area, issued by the Secretary of Agriculture of the United States pursuant to the Agricultural Marketing Agreement Act of 1937, and commanding said defendant, its agents, attorneys, employees, successors, and assigns, particularly to file all requisite reports for the said period, making the same true and complete in every respect as to form and substance, and to make available to the Market Administrator, established under the said Order, or his duly author-

ized representatives, all books, memoranda, accounts, and records required by the said Market Administrator for the verification of the information contained in the said reports submitted by the defendant Turner Dairy Company.

"2. That jurisdiction of this cause be, and it is hereby, retained by the Court for the purpose of making and entering such further orders, decrees, and judgments as may be necessary to afford full relief to the parties.

"HOLLY,

"*District Judge.*

"Dated Mar. 24, 1942." (Rec. 135, 136.)

On May 22, 1944, twenty-six months after the entry of this decree, the plaintiff filed a motion for supplemental judgment, in which it sought a money judgment in the sum of $24,317.76 (Rec. 183-184).

On motion the court ordered the said motion stricken (Rec. 187).

On October 6, 1944, two years and six months after the date of the foregoing decree, the plaintiff filed a motion "for further hearing upon plaintiff's motion for summary judgment and for further relief" (Rec. 189). In this motion the plaintiff again sought a mandatory injunction "enjoining and commanding the defendant to pay the Market Administrator $24,317.76". The plaintiff further sought a permanent injunction restraining the defendant, its agents, etc. from violating the provisions of Order No. 41 and its amendments; and it also sought a judgment in the sum of $24,317.76 in favor of H. H. Erdmann, acting Market Administrator (Rec. 192).

In support of said motion the plaintiff filed the affidavit of Herbert H. Erdmann, Acting Market Administrator, in which he recited that the reports of the Turner Dairy

Company, and audits thereof, indicated that $24,317.76 was due the Market Administrator for various funds, such as the producer-settlement fund, administration expenses and marketing services (Rec. 193-195).

The relief specifically prayed for in the said motion was for a further hearing in this cause "upon plaintiff's motion for summary judgment and for the entry of an order in the exercise of the jurisdiction specifically reserved by this court" (Rec. 192).

The defendant filed a motion to strike plaintiff's motion for further hearing on its motion for a summary judgment for the following reasons:

> "1. There is no proceeding known to the Federal Courts to obtain a supplemental judgment.
>
> "2. A similar motion of the plaintiff has heretofore been stricken by the Court.
>
> "3. The allegations in plaintiff's motion are repugnant to each other.
>
> "4. The allegations are remote, vague, indefinite and are not pertinent to the issues raised by the complaint, the supplemental complaint, and the answers of the defendant thereto.
>
> "5. The prayer for a broad, or blanket injunction, to enjoin the defendant from violating the provisions of Order No. 41, as amended, are improper and are not authorized by the allegations in the complaint, or supplemental complaint.
>
> "6. The motion seeks a judgment with respect to matters, and on grounds that are not alleged in the complaint or supplemental complaint.
>
> "7. It seeks a judgment in favor of a person who is not a party plaintiff nor a party defendant, but is a stranger in this cause." (Rec. 197, 198.)

On April 5, 1945, the plaintiff withdrew paragraph 3 of its motion for further hearing on plaintiff's motion for summary judgment filed on April 6, 1943. (This was the

prayer for judgment in favor of the Market Administrator.)

At the same time the aforesaid motion of the defendant was denied and defendant was given 20 days to answer the motion of the plaintiff.

On June 1, 1945, the defendant filed its answer, consisting of 15 numbered paragraphs. Paragraphs numbered VI to and including Paragraph XV were withdrawn, on motion of the defendant (Rec. 214). The remainder of defendant's answer is as follows:

> "I. The prayer for a broad or blanket injunction to mandatorily enjoin and command the defendant, its agents, attorneys, employees, and assigns, to fully comply with Order No. 41, is improper, and is not authorized by the allegations in the complaint or supplemental complaint, and the said mandatory injunction must be limited by the specific allegations contained in the complaint and supplemental complaint as to the defendant's violations of Order No. 41.
>
> "II. The prayer for a permanent order restraining and enjoining the defendant, its agents, attorneys, employees, successors, and assigns, from handling of milk in violation of the terms and provisions of Order No. 41, as amended, is not justified or warranted by the allegations in the complaint and supplemental complaint.
>
> "III. The plaintiff ought not to have a further hearing upon any matters other than whether or not an injunction, based upon the allegations in the complaint and supplemental complaint, should be made permanent.
>
> "IV. The present motion is not authorized or permitted under Rule 56 of the Federal Rules of Civil Procedure.
>
> "V. It appears from the record that a summary judgment has already been entered in this cause for the plaintiff on the plaintiff's complaint and supplemental complaint, and the answers of the defendant thereto." (Rec. 209, 210.)

On September 26, 1945, the court filed a memorandum opinion (Rec. 216, 217), in which it found the issues against the defendant on its answer and further found that there was no issue of fact in the case. The court further found that the plaintiff is entitled to an injunction as prayed requiring the payment of $24,317.76 to the Market Administrator. With respect to another prayer for an injunction, the court stated in the said memorandum: "Plaintiff also asks for an injunction restraining the defendant from handling milk in violation of the order of the Secretary of Agriculture, but as it is not shown that defendant has been guilty of any violations since 1941, I do not think the injunction should be granted." (Rec. 217.)

On September 28, 1945, the court entered a judgment (Rec. 218), in which it found that the Market Administrator had determined from the examination of the defendant's books and records, that the defendant is indebted to the Market Administrator in the sum of $24,317.76. The court further found that because the defendant had failed to avail itself of the administrative remedy provided by the Agricultural Marketing Agreement Act of 1937, for the purpose of reviewing such determination, as to this proceeding, the determination by the Market Administrator is deemed conclusive. The court further stated that there is no issue of fact in the case, it being concluded that the plaintiff is entitled to judgment as a matter of law and the court thereupon ordered, adjudged and decreed:

> "1. That the defendant is hereby commanded and mandatorily enjoined to pay to the Market Administrator duly designated to administer the provisions of Order No. 41 as originally issued and as subsequently amended, Order regulating the handling of milk in the Chicago, Illinois, marketing area, issued by the Secretary of Agriculture of the United States, the sum of $24,317.26, with interest at six per centum per annum

thereon from the respective dates on which the payments became due under the provisions of said Order 41 as originally issued and as subsequently amended.

"2. That the defendant pay all the costs of this action.

"3. That this court retain jurisdiction for the purpose of entering such further orders, or judgments, as the court may deem just and proper." (Rec. 219.)

The petitioner appealed from this judgment September 28, 1945, to the Circuit Court of Appeals for the Seventh Circuit. The judgment was affirmed. The principal reasons for affirmance are that the first summary judgment was interlocutory rather than final and that the second summary judgment did not unduly enlarge the scope of the relief prayed in the original complaint.

## STATUTES AND RULES INVOLVED.

1. The Agricultural Marketing Agreement Act of 1937, 7 U. S. C. A. 674, 50 Stat. 249. The particular sections involved are:

"Sec. 8a(6) The several district courts of the United States are hereby vested with jurisdiction to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts."

"Sec. 8c(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall

determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires."

2. The Federal Rules of Civil Procedure as they existed during the litigation. The particular rules involved are:

"Rule 6(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

"Rule 8(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

"Rule 54(b) Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

"Rule 54(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for

judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

"Rule 56(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

"Rule 56(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

"Rule 56(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

3. Order No. 41 regulating the handling of milk for the Chicago, Illinois, Marketing Area. (This lengthy Order appears in the record, pp. 7-21.)

## THE QUESTIONS PRESENTED.

1. Whether the complaint stated a claim for damages upon which a second summary judgment for damages may be entered two and one-half years after the first summary judgment was entered.

2. Whether the second summary judgment for damages could be entered without an amendment to the complaint being filed setting up the claim for damages.

3. Whether the first summary judgment, entitled "Order", entered on March 24, 1942 was conclusive and final as to all issues raised by the complaint and amendment thereto.

4. Whether the reservation of jurisdiction in the first judgment, for the purpose of making and entering further orders, decrees, and judgments as may be necessary to afford full relief to the parties, enabled and permitted the entry of the second summary judgment.

5. Whether a new judgment rendered two and one-half years after the entry of the first judgment and without amendment of the complaint may be entered.

6. Whether two summary judgments of different import may be entered upon the same claim set forth in the complaint.

## THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The finding of the Circuit Court of Appeals that the complaint and prayer for relief was sufficient to permit the entry of the summary judgment for damages is in apparent conflict with a decision of the Second Circuit Court of Appeals, *Downey* v. *Palmer,* 114 F. 2d 116, and with a decision of the Circuit Court of Appeals for the Ninth Circuit, *Connolly* v. *United States,* 149 F. 2d 666. This conflict should be resolved by this Court.

2. The conclusion of the Circuit Court of Appeals for the Seventh Circuit that the order from which the appeal was taken did not unduly enlarge the scope of the relief prayed in the original complaint is in conflict with Rule 8(a), which requires that the relief prayed for shall depend upon the claim alleged. The effect of this rule should be clarified by the Supreme Court of the United States.

3. To the extent that Circuit Court of Appeals for the Seventh Circuit extended the reservation of jurisdiction in the first judgment to permit the entry of the second judgment, its decision is in conflict with that of the Circuit Court of Appeals for the Eighth Circuit in the case of *Woods Bros. Constr. Co.* v. *Yankton County,* 54 F. 2d 304.

4. The holding of a Circuit Court of Appeals that the first judgment was not final is in apparent conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Woods Bros. Constr. Co.* v. *Yankton County,* 54 F. 2d 304, and is in apparent conflict with

the decision of the Supreme Court in the case of *Catlin* v. *United States,* 324 U. S. 229, 233.

5. The Federal Rules of Civil Procedure heretofore set forth under the title of "Statutes and Rules Involved" need further clarification and interpretation for the benefit of the Courts and the Bar.

6. In not conforming the second judgment to the claim asserted in the pleading but affirming under the prayer for relief, the opinion of the Circuit Court of Appeals for the Seventh Circuit was in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit: *Sylvan Beach* v. *Koch* (1944), 140 F. 2d 853. This conflict should be resolved by this Court.

## PRAYER FOR WRIT.

Wherefore, the Petitioner prays that a Writ of Certiorari issued by this Honorable Court to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in the foregoing case of United States of America *vs.* Turner Dairy Company.

TURNER DAIRY COMPANY,
*Petitioner,*
GEORGE F. CALLAGHAN,
*Attorney for Petitioner.*

MYER H. GLADSTONE,
RALPH J. GUTGSELL,
*Of Counsel.*

## BRIEF IN SUPPORT OF THE PETITION.

### OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (Rec. 236-240) is reported in the case, *United States* v. *Turner Dairy Company,* 162 F. 2d 425.

### JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Section 347, Title 28, U. S. C. A.

The judgment of the Circuit Court of Appeals was entered on June 20, 1947 (Rec. 236); the petitioner filed a petition for rehearing on July 7, 1947 (Rec. 241), which was within the time provided by the rules of the Circuit Court of Appeals for the Seventh District in which to file petitions for rehearing; this petition for rehearing was denied on August 7, 1947 (Rec. 242).

### THE FACTS.

The facts are set out in the Petition and for the sake of brevity will not be repeated here.

## SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals for the Seventh Circuit erred in holding that the summary judgment of March 24, 1942, was not final but interlocutory.

2. The Circuit Court of Appeals erred in affirming the second summary judgment entered on September 28, 1945.

3. The Circuit Court of Appeals erred in holding that the second summary judgment entered on September 28, 1945, did not unduly enlarge the scope of relief prayed in the original complaint. Since the District Court found that the petitioner had not been guilty of any violations of Order No. 41 since 1941 (Rec. 217) it should have required the plaintiff to have filed an amendment prior to the entry of any judgment.

4. The Circuit Court of Appeals held "since the Administrator could not determine the amounts due until report requirements had been met" Appellee is correct in its contention that the relief granted by the order of March 24, 1942, was partial in character and incidental to the main object of the action, hence, that it was an interlocutory rather than a final judgment as contended by the appellant. Since it appears from the record that the petitioner had not been guilty of any violations since 1941 (Rec. 217) it appears that the Administrator had all the information necessary prior to March 24, 1942, and could have obtained *all* of the relief that it desired on March 24, 1942.

5. The District Court erred in granting the Government a further hearing upon matters other than the allegations set forth in the supplemental complaint.

6. The second motion for a summary judgment is not authorized or permitted under Rule 56 of the Federal Rules of Civil Procedure.

7. It appears from the record that a summary judgment had already been entered in this cause for the Government on the Government's complaint and Supplemental Complaint and the answers of the defendant thereto (Rec. 209, 210).

8. A similar motion by the Government had been made prior to the motion upon which the second summary judgment was entered and had been stricken by the Court, two and one-half months prior to the entry of the second judgment; this constituted *res judicata* as to all matters contained in the prior motion.

9. The motion upon which the second judgment was entered sought relief with respect to matters, and on grounds, that are not alleged in the complaint or supplemental complaint.

## ARGUMENT.

### I.

**The Federal Rules of Civil Procedure Did Not Authorize Nor Empower the District Court to Enter the Second Summary Judgment.**

Three provisions of the Federal Rules of Civil Procedure directly and imminently affect this case. They are rules 8(a), 54(c) and 56(a) as they existed during the litigation in the District Court. (Rules 56(a) and (c) have since been amended.)

Rule 8(a) provided that a pleading which sets forth an original claim shall contain a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for the relief to which he deems himself entitled.

Rule 54(c) provided that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Rule 56(a) provided that a party seeking to recover upon a claim may at any time after the pleading in answer thereto has been served, move for a summary judgment in his favor upon all or any part thereof.

In conformity with Rule 8(a) the plaintiff filed a claim by way of an original complaint that the defendant had violated Order No. 41, in four respects:

1. That the defendant failed and refused to make the reports required by the Order (Par. VII, Rec. 4).

2. That it failed to make available its records for verification (Par. VIII, Rec. 4).

3. That it submitted false butter records for November and December 1939 and that the Market Administrator therefor classified the milk used for butter as Class I (the highest class) (Par. IX, Rec. 5).

4. That it should make payments into the Producers' Settlement fund and has failed and refused to do so and at the time of filing the complaint was in default thereof for all of the delivery periods from the effective date of the order (September 1, 1939) to the date of the filing of the complaint (May 7, 1940) (Par. X, Rec. 5).

Upon these allegations the plaintiff prayed for a preliminary mandatory injunction seeking to compel the defendant to comply *fully* with *all* of the provisions of Order No. 41.

But Order No. 41 contained further provisions requiring a handler of milk to file his producer payroll reports (Sec. 941.3a), to pay certain administration expenses (Sec. 941.9a) and to withhold from producers 3¢ per hundredweight of milk and to pay over the same to the Market Administrator (Sec. 941.10a).

Obviously, under the claim alleged in the original complaint, the plaintiff was not entitled to a blanket injunction restraining the defendant from violating *any* provision of the Order or compelling *full* compliance with *all* of the provisions thereof, since the complaint failed to allege violations of at least three sections of the Order. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426; *Bowles* v. *Montgomery Ward & Co., Inc.* (CCA 7), 143 F. 2d 38, 42.

Apparently because of this defective pleading the plaintiff filed a supplemental complaint in which the additional violations above set forth were alleged (Rec. 70).

It is imperative that the plaintiff plead actual violations of the Order to support the prayer for an injunction, whether of a mandatory or prohibitory character; allegations of threatened violations will not suffice.

The Circuit Court of Appeals for the Seventh Circuit held that the relief granted did not unduly enlarge the scope of the relief prayed in the original complaint and thus based the right to relief upon the prayer therefor and not upon the claim asserted. This is in conflict with rules 8(a) and 56(a) of the Federal Rules of Civil Procedure and with a decision of the Circuit Court of Appeals for the Ninth Circuit.

In the case of *Connolly* v. *United States* (CCA 9, 1945), 149 Fed. 2d 666, the defendant was charged with trespass on an Indian Reservation in that they drove cattles and horses thereon in violation of a treaty between the United States and certain Indian tribes and rules of the Secretary of the Interior regulating grazing on the Indian Reservations.

The complaint specifically alleged that the defendants refused to obey orders to desist in their trespassing and asked for both a temporary and permanent injunction, for damages of $1,341.00 and "for such other and further relief in the premises as to the Court may seem meet and equitable."

The statute permitted recovery of a penalty for the trespass. At the trial no evidence was offered by the Government pertaining to the statute or in support of a penalty. In the final arguments, however, the penalty question was considered. The lower court awarded a permanent injunction and a $258.00 penalty, holding that "From a perusal of the allegations of the complaint, it appears that the statutory provisions upon which the plaintiff could rely for a recovery *are suggested* by the facts

as alleged although *no specific reference is made to the recovery of the penalty as provided in Section 179 of Title 25, U. S. C. A.*" The Circuit Court of Appeals held "the penalty as assessed is set aside, but the judgment is otherwise affirmed." (Italics ours.)

The decision appears also to conflict with one of the Circuit Court of Appeals for the Second Circuit.

In the case of *Downey* v. *Palmer* (CCA 2, 1940), 137 Fed. 2d 441, the plaintiff, a receiver of an insolvent bank, sued the defendant for a shareholder's assessment on which a balance of $27,000.00 was due, pleading that $35,000.00 had been paid on account. The defendant alleged that the payment of $35,000.00 was accepted by a prior receiver in full satisfaction of her indebtedness and that the cause of action was barred by the statute of limitations. To this, the plaintiff replied that the release was obtained upon the payment of $35,000.00 by false and fraudulent representations as to her financial condition and that upon discovery of a fraud, the plaintiff elected to rescind the settlement agreement. In his reply the plaintiff asked judgment that settlement and release be declared void and that he have judgment as prayed in the complaint. Summary judgment was granted in favor of the defendant on the ground that the action was barred by the statute of limitations.

In reversing the judgment the Circuit Court of Appeals held (p. 117):

> * * * "That the plaintiff may have such a case was recognized by the district court in awarding judgment without prejudice to the institution of an action for damages based upon the alleged fraud. In view of the liberality in pleading and the free power of amendment given by the new Federal Rules of Civil Procedure particularly Rule 15(b), 28 U. S. C. A. following section 723c, relating to amendments to conform

to the proof, and Rule 54(c), providing that every final judgment shall grant the full relief to which the party is entitled, even though not demanded—it is argued that the present action should have been considered as one for damages for fraud, and that it was error to grant summary dismissal of the complaint for what was at most a defect in pleading. Cf. *Seaboard Terminals Corp.* v. *Standard Oil Co. of New Jersey*, 2 Cir., 104 F. 2d 659, 660. No request to amend the pleadings was made to the district court. However, since the court recognized that a cause of action might exist for damages resulting from the fraud alleged in the reply, we think it should not summarily have dismissed the complaint before trial. Dismissal should have been conditioned on failure of the plaintiff to reframe his complaint, within such time as the court might set, so as to state a cause of action to which the three year statute of limitations would not apply. To require a new action to be brought instead of permitting the pending action to go on to trial, with proper amendment of the complaint to convert the action into one for fraud, seems an unnecessary and undesirable insistence upon the original form of the plaintiff's statement of his case, which the new Rules were designed to avoid. The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion."

The present holding of the Circuit Court for the Seventh Circuit, on this point, seems to be in conflict with an earlier decision.

In the case of *Kansas City, St. L. & C. R. Co.* v. *Alton R. Co.* (CCA 7, 1941), 124 F. 2d 780, 783, it was said:

"We do not think that the prayer on this part of the complaint is for equitable relief. Even if it were, the prayer does not control. The prayer may be looked to to help determine the relief to which the appellant is entitled, but it is not controlling."

"The question is not whether the Plaintiff has asked

for the proper remedy but whether under his pleadings he is entitled to any remedy."

"If the appellant has stated a cause of action for any relief, it is immaterial what he designates it or what he has asked for in his prayer; the court will grant him the relief to which he is entitled under the facts pleaded. Par. (c) of Rule 54, Federal Rules of Procedure, 28 U. S. C. A. following § 723c. See, also, *Atwater* v. *North American Coal Corporation*, D. C., 36 F. Supp. 975-977."

## II.

**The Summary Judgment, Entitled "Order", Entered on March 24, 1942, Was Conclusive and Final as to All Issues Raised by the Pleadings.**

The Circuit Court of Appeals made its finding on whether or not the judgment of March 24, 1942, was final or interlocutory upon the ability of the plaintiff to obtain all the relief it desired at that time (Rec. 239, 240). The Court *erroneously* found that this could not be done because the reports had not been filed up to *that* time. The record shows *affirmatively* that the defendant had not been guilty of any violations since 1941 (Rec. 217, Tr. p. 350); this, at its worst means December 31, 1941. The plaintiff at that time had all the reports and books for verification, and could have, by amendment, asserted its claim for specific damages in the summary decree entered almost three months later. This decree ended all the litigation on the merits that the plaintiff asserted or could have asserted at that time, based upon the claim alleged.

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States* (1945), 324 U. S. 229, 233, 65 S. Ct. 631, 633.

In the case of *Woods Bros. Const. Co., Inc.* v. *Yankton*

*County*, 54 F. 2d 304, 308, a similar situation was discussed.

"That there may be finality in judgments is essential to stability of rights and interests, and the general rule is that judgments and decrees at the close of the terms at which they were rendered pass beyond the control of the court, and the court has no power then to destroy their legal effect unless proper steps are taken during the term to form the basis of a change thereafter. It is undoubtedly true that a court after the term may by proper order correct clerical and inadvertent errors. A much-quoted case on the subject is *Bronson* v. *Schulten*, 104 U. S. 410, 26 L. Ed. 797. We quote therefrom, page 415 of 104 U. S., 26 L. Ed. 797:

" 'In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the State courts they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.

" 'But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision.' "

Rule 6(c) of the Federal Rules of Civil Procedure does not abolish terms of court. This rule reads:

"The period of time provided for the doing of any

act or the taking of any proceeding is not affected or limited by the expiration of a term. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

Rule 6(c) has received judicial interpretation. In the case of *National Popsicle Corp.* v. *Hughes* (D. C. Cal., 1940), 32 F. Supp. 397, it was held that Rule 6(c) cannot be construed as meaning that a court has continuing jurisdiction over its final judgments and, if period of termination is specified in Rules of Civil Procedure, such period governs, but *otherwise the end of the term marks the termination* of court's power to modify or vacate final judgments.

This case was cited with approval and followed in *Bateman* v. *Donovan*, 131 F. 2d 759, 764, in which the court of review set aside an order granting a new trial after term time. The rule in the District Court case above cited was also quoted, discussed, and followed in the case of *Safeway Stores* v. *Coe*, 136 F. 2d 771, 775.

## III.

**(a) An Attempted Reservation in the Judgment Itself, For the Purpose of Making and Entering Further Orders, Decrees and Judgments Is Void.**

**(b) A New or Amended Judgment Rendered at a Subsequent Term Pursuant to Such Reservation, Is Without Jurisdiction and Void.**

What is the effect of the reservation of jurisdiction in the decree reading as follows:

"2. That jurisdiction of this cause be, and it is hereby, retained by the Court for the purpose of mak-

ing and entering such further orders, decrees, and judgments as may be necessary to afford full relief to the parties." (Tr. 136.)

This question is in the case of *Woods Bros. Const. Co.* v. *Yankton County,* 54 F. 2d 304, at p. 310:

> "Passing the doubtful question as to whether a court by such a reservation could determine its own powers after the term had ended and enlarge its authority conferred by statute, we are satisfied that the reservation reserves no power the court d'd not already possess. It certainly had power to enforce its own judgment. Without such power the judgment would amount to nothing. The reservation relates to nothing else. It was for the benefit of the plaintiff to assist in collecting its judgment. The rule is stated in 34 Corpus Juris, p. 219, § 440, as follows: 'An attempted reservation in the judgment itself of power to amend or vacate it at a subsequent term does not enlarge or extend the authority which the court otherwise has in that behalf, and a new or amended judgment rendered at a subsequent term pursuant to such reservation is without jurisdiction and void; the prior judgment continues in force.' "

In this case it was sought to vacate the judgment after term time for the reason, among others, that the power to vacate was held by the court to exist because of the reservation in the order for judgment. The reservation relied on in the *Woods Bros.* case, reads as follows:

> "The court reserves full and complete jurisdiction of this cause and of all the parties thereto, for the purpose of making or entering any further orders or judgments that may be necessary for the protection of the plaintiff herein, and to compel the payment of its said judgment and to enforce performance of the same by the said Board of County Commissioners (and their successors in office), and other officers of the said county, in such manner as the court shall deem proper and necessary." (pp. 305, 306 of Opinion.)

## IV.

### A Decree Must Conform to the Pleadings.

A comparison of the complaint and supplemental complaint with the decree of March 24, 1942, shows that the court granted all the relief prayed for and that the pleadings and the decree *are in perfect conformity.* All the issues raised by the complaints and the answers of the defendant were completely and finally disposed of.

A comparison of the complaints with the second decree indicates that they do not conform with each other.

In the case of *Sylvan Beach* v. *Koch* (CCA 8, 1944), 140 F. 2d 852, 861, it was stated:

> "A court may not, without the consent of all persons affected enter a judgment which goes beyond the claim asserted in the pleadings. *Standard Oil Co.* v. *State of Missouri,* 224 U. S. 270, 281, 34 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913 D, 936; *Barnes* v. *Chicago, M. & St. P. R. Co.,* 122 U. S. 1, 14, 7 S. Ct. 1043, 30 L. Ed. 1128; *Reynolds* v. *Stockton,* 140 U. S. 254, 265, 266, 11 S. Ct. 773, 35 L. Ed. 464; *Clark* v. *Arizona Mut. Savings & Loan Ass'n.,* D. C. 217 F. 640, 642-644; *Gentry* v. *United States,* 8 Cir., 101 F. 51. Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the Court can consider only the issues made by the pleadings and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded. A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved.
>
> "The foregoing rules are all fundamental and state nothing more than the essentials of due process and fair play. They assure to every person his day in court before judgment is pronounced against him. They cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment or by giving notice of the entry of judgment or by entertaining motions to vacate a judgment after it has been entered."

## Conclusion.

For all of which reasons we respectfully pray that the Writ of Certiorari issue.

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767281—47

# In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 412

TURNER DAIRY COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the District Court (R. 216–217) is not reported. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 236–240) is reported at 162 F. 2d 425.

### JURISDICTION

The judgment of the court below was entered on June 20, 1947 (R. 241), and a petition for rehearing was denied on August 7, 1947 (R. 242). The petition for a writ of certiorari was filed on October 24, 1947. The jurisdiction of this court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

## QUESTIONS PRESENTED

(1) Whether the complaint which initiated this proceeding in the district court stated facts legally sufficient to form the basis of that court's judgment requiring the petitioner to pay the money due from it under the provisions of the milk marketing order to which it was subject.

(2) Whether the judgment entered by the district court on March 24, 1942, was conclusive as to all issues raised by the complaint or was an interlocutory judgment determining only part of these issues.

## STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601, *et seq.*) which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31, 672, 675), as amended by the Act of August 24, 1935, 49 Stat. 750, 762, Section 8a (6) of the Agricultural Adjustment Act, as amended and reenacted, provides as follows:

> (6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order, regulation or agreement,

> heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

The order involved is Federal Order No. 41, regulating the handling of milk in the Chicago, Illinois, marketing area, originally issued on August 28, 1939, effective September 1, 1939 (4 F. R. 3764), and reissued with amendments on June 21, 1940, effective July 1, 1940 (5 F. R. 2337). The order is printed in the Record at pages 7–21, 92–113.

**STATEMENT**

The petitioner is a milk handler subject to Federal Order No. 41 (R. 135).[1] The milk order fixes a use value, uniform as to all handlers, for each of the classes of milk defined in the order. The price applied to Class I, or fluid milk, is the highest; the prices applied to Class II, III, or IV milk (that milk the butterfat of which is used to make cream, ice cream, butter, cheese or other products) are progessively lower (Order, Sections 941.4, 941.5; R. 13–15, 98–106). Each handler is required to report to the Market Administrator the quantity of milk used in each class during the preceding monthly delivery period. Upon the basis of these reports, the total of the use values of milk purchased by all handlers from all producers is divided by the total quantity of milk so

[1] The Act and the Order involved in this case were before this Court in *United States* v. *Ruzicka*, 329 U. S. 287 and *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110.

purchased. The result is a uniform minimum price that all handlers must pay producers. The variance among handlers in the percentage of milk used in a given class will normally mean that the use value of the milk purchased by a handler will be greater or less than the payments at the uniform price that the handler is required to make to his producers. Any handler for whom there is a plus difference is required to pay the difference into a producer-settlement fund or equalization pool, while any handler for whom there is a minus difference is entitled to withdraw the difference from the fund. In this manner all handlers are enabled to pay their producers the uniform minimum price regardless of the use to which the milk is put.

The milk order requires each handler to pay to the Market Administrator as the handler's pro rata share of the expense of administering the order not to exceed two cents per hundredweight of all milk handled during the delivery period (Section 941.9; R. 19, 110–111). Salaries and expenses of administration are paid from this fund. The order also authorizes the Market Administrator to render marketing services to producers (market information, weighing, testing, etc.), and in order to defray the cost thereof requires each handler to deduct from payments due the producers to whom the service is rendered an amount not to exceed three cents per hundredweight of all milk received (Section 941.10; R. 19–20, 111).

The Market Administrator is required to verify or check the accuracy of the handler's reports and payments by an audit of the handler's books and records (Section 941.3 (b); R. 98).

This action was instituted by the filing of a complaint and a supplemental complaint under Section 8a (6) of the Act to compel the petitioner (1) to make reports, (2) to submit its records for audit, and (3) to make payments to the producer-settlement fund, the administrative expense fund, and the marketing service fund as required by the order (R. 2–6, 90–91). Upon evidence adduced at a hearing upon respondent's motion for summary judgment, the court found that the petitioner had failed and refused to make available to the Market Administrator the books and records necessary to enable him to verify the reports that the petitioner had filed, and that the extent to which such reports were incomplete and inaccurate could not be determined until the Market Administrator was given access to the books and records (R. 125–127). On March 24, 1942, the court entered an "order" mandatorily commanding and enjoining the petitioner to comply fully with all provisions of the order with respect to the period from September 1, 1939, to June 30, 1941, and particularly to file all requisite reports for the period and to make available to the Market Administrator all books and records necessary for the verification of such reports (R. 135–136). The court expressly retained jurisdic-

tion of the cause for the purpose of entering such further order or judgment as might be necessary to afford full relief (R. 136).

The respondent on February 1, 1943, moved to have the petitioner's officers cited for contempt of the court's order of March 24, 1942, by reason of their wilful failure and refusal to file reports and to open the petitioner's books and records for audit by the Market Administrator, as required by said order (R. 136–139). Following the initiation of this contempt proceeding, the petitioner filed reports covering the period from September 1, 1939, to June 30, 1941, and the Market Administrator found, from an audit of these reports and of the petitioner's books and records, that the petitioner owed to him, with respect to this period, the sum of $24,317.76 for the producer-settlement fund, for administration expenses, and for marketing services (R. 203–204). Bills were sent to the petitioner but it failed to pay any part of the amount which had been found to be due (R. 204–205).

The respondent then filed on October 6, 1944, a motion for further relief by way of a mandatory injunction to compel the petitioner to pay to the Market Administrator the amounts found to be due under the order, and for a permanent injunction restraining future violations of the order (R. 189–193). The court found that the respondent was entitled to further relief, and entered judgment on September 28, 1945, manda-

torily commanding and enjoining the petitioner to pay to the Market Administrator the sum of $24,317.26,[2] with interest at the rate of 6 per cent per annum from the dates on which the various payments were due (R. 216–219). The Circuit Court of Appeals for the Seventh Circuit affirmed this judgment (R. 241).

## ARGUMENT

### I

The petitioner contends (Pet. 23) that the court below based respondent's right to relief upon the prayer of respondent's complaint rather than upon the claim which the complaint asserted. We submit that this contention is clearly erroneous. The complaint stated that it was brought "to enforce the provisions of" Milk Order No. 41 (R. 3) and it alleged that the petitioner had violated this order by refusing to make reports to the Market Administrator and to make payments to him, as required by the order, and by making incomplete and false reports (R. 4–6). The relief granted by the district court consisted of (1) an interlocutory order compelling petitioner to file the reports required by the milk order and to make its books and records available to the Market Administrator and, thereafter, (2) a judgment requiring petitioner to pay the sum of money which, after

[2] The judgment recites the amount of the obligation to be $24,317.26, although the claim is for $24,317.76.

audit of its reports, books, and records, was found to be owing to the Market Administrator. The latter relief, as well as the former, was fairly within the claims asserted in the respondent's complaint.

The court below did not make the right to require a money payment from the petitioner dependent upon the words of the prayer of the complaint, without regard to the claim asserted. The court pointed out that the complaint alleged the petitioner's refusal to make payments to the Market Administrator and that such payments were "an integral part of the scheme contemplated by" the milk marketing order, enforcement of which was sought (R. 240). The reference to the scope of the prayer for relief, in the concluding sentence of the opinion, merely emphasizes that the prayer for relief, like the allegations of the complaint, embraced the demand that the petitioner be required to pay the amounts due from it under the milk order. That an action of this kind lies under Section 8a (6) of the Agricultural Marketing Agreement Act of 1937 is established by *United States* v. *Ruzicka,* 329 U. S. 287.

The petitioner has suggested (Pet. 16, 23–25) that the decision of the court below is in conflict with *Connolly* v. *United States,* 149 F. 2d 666 (C. (C. C. A. 9) and *Downey* v. *Palmer,* 114 F. 2d 116 (C. C. A. 2). But the asserted conflict rests upon the premise, which we have shown to be unwarranted,

that the complaint in the present case did not demand that the petitioner be required to pay the amounts due from it under the provisions of the milk order. Statement of the holdings in the two cited cases makes evident the absence of any conflict with the present decision.

In the *Connolly* case the complaint sought damages for prior trespasses upon an Indian reservation and an injunction against further trespasses, but it made no reference to liability for a statutory penalty for such trespass, and the case was tried upon the basis that the statutory penalty was not in issue. The appellate court accordingly set aside judgment for the statutory penalty and otherwise affirmed the judgment. The *Downey* case was a suit to cover the unpaid balance of an assessment made against a stockholder of an insolvent national bank. The defendant pleaded a release of the claim, to which the plaintiff replied that the release had been obtained by fraud. The court held that the original claim was barred by the statute of limitations and that this claim, in the absence of any request to amend the complaint, could not be converted into a claim for damages based upon fraudulent misrepresentation.

The petitioner also suggests that the present decision is in conflict with an earlier decision by the same court, *Kansas City, St. L. & C. R. Co.* v. *Alton R. Co.*, 124 F. 2d 780 (C. C. A. 7), but the petitioner's quotation from this case (Pet.

25–26) is in entire accord with the decision in the instant case.

## II

The petitioner contends (Pet. 26) that the judgment entered by the district court on March 24, 1942, was conclusive as to all issues raised by the pleadings and that the judgment was therefore a final one which the court was without power to amend or modify following expiration of the term at which the judgment was entered. But that judgment could and did determine only part of the issues raised by the complaint and the judgment was therefore interlocutory rather than final.

The court, in entering judgment, reserved jurisdiction of the cause for the purpose of entering such further orders and judgments as might be necessary to afford full relief to the parties (R. 136). The court's findings, on which that judgment was based (R. 135), show that the amount of money due from the petitioner under the milk order was not then ripe for determination. The findings expressly state that the petitioner had refused to make its books and records available to the Market Administrator and that the extent to which its reports were incomplete and inaccurate could not be determined until the Market Administrator had been given access to all of the petitioner's books and records (R. 134). Since audit of the handler's books was an essential step in ascertaining what payments were required of

him under the milk order,[3] the amount due from the petitioner was, on the date the judgment was entered, because of its own violation of the order, not capable of being determined.[4]

The petitioner asserts (Pet. 16) that the decision below is in conflict with *Woods Bros. Const. Co.* v. *Yankton County,* 54 F. 2d 304 (C. C. A. 8). But in that case the judgment which the trial court set aside after expiration of the term was admittedly a final one. The case is, therefore, not even pertinent to the issue presented here, namely, whether the judgment of March 24, 1942, was interlocutory or final.

While the district court, when it issued its final judgment, refused to grant a further injunction restraining the petitioner from handling milk in violation of the milk order, upon the ground that the petitioner had not been shown to have been guilty of any violations since 1941 (R. 217), this statement obviously refers to violations occurring subsequent to the marketing period in controversy, and does not mean that the petitioner had not, after December 1941, continued to violate the milk order by failing to perform the obligations imposed upon it with respect to the period from September 1, 1939, to June 30, 1941.

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[3] Section 941.3 (b) of the milk order requires the Market Administrator to verify the accuracy of a handler's reports by an audit of its books and records (R. 98).

[4] In fact, petitioner did not permit an audit of its books until after civil contempt proceedings against it had been commenced (R. 138–139, 238).

## CONCLUSION

The decision below is correct and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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